No. 09-1530

In The Supreme Court of the United States

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,

Petitioner,

v.

RITE AID OF PENNSYLVANIA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does The Petition Present Any Compelling Reason(s) For Granting The Writ Of Certiorari?

2. Did The Third Circuit Court of Appeals Violate This Court's Arbitrability Case Law By Holding, On The Facts Of This Case, That A Court May Need To Touch Incidentally On The Merits When The Arbitrability Determination And The Merits Are Inextricably Intertwined?

STATEMENT PURSUANT TO RULE 29.6

Rite Aid Corporation is Respondent Rite Aid of Pennsylvania, Inc.'s parent corporation. Rite Aid Corporation owns 10% or more of Rite Aid of Pennsylvania, Inc.'s stock.

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COUNTERSTATEMENT OF THE CASE

Rite Aid of Pennsylvania, Inc., hereby incorporates by reference and adopts the recitation of facts set forth in the opinion of the United States Court of Appeals for the Third Circuit in *Rite Aid of Pa., Inc. v. United Food and Commercial Workers Union, Local 1776*, 595 F.3d 128, 137 (3d Cir. 2010).

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Present Any Compelling Reason(s) For Granting The Writ Of Certiorari

Supreme Court Rule 10 provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion" and that "certiorari will be granted only for compelling reasons." Rule 10 further states that such "compelling reasons" may only be found to exist where a United States Court of Appeals has rendered a decision that conflicts with a decision of another United States Court of Appeals in the same important matter; a United States Court of Appeals has decided an important federal question in a way that conflicts with the decision by the highest court of a state; or, a United States Court of Appeals has decided an important issue of federal law in a way that conflicts with the decisions of this Court. Rule 10 further states that "[a] petition for writ certiorari is rarely granted when the asserted error

consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The United Food and Commercial Workers Union, Local 1776's ("Union") Petition for Writ of Certiorari ("Petition") does not state any "compelling reasons" for granting certiorari. Although Rule 10's reasons are not exclusive, this Court has held that it should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). No "conflict of authority," embarrassing or otherwise, exists.

First, the Union's Petition fails to identify *any* circuit court conflict. As this Court recognized, "[a] principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

The Union does not attempt to allege a split in circuit court authority on the arbitrability-merits question. In fact, the Union's Petition concedes exactly the opposite: namely, that "the Third Circuit's holding in this case is the latest in a *growing body of decisions* from the Circuit Courts of Appeals that

have permitted an examination of the merits of the grievance to determine arbitrability despite the presence of a broad arbitration clause in an existing contract." (Union Petition, at 13-14) (italics added) (citing *IBEW v. GKN Aero. N. Am., Inc.*, 431 F.3d 624 (8th Cir. 2005) and *Independent Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233 (7th Cir. 1993)).

The Third Circuit, as does the Union, also recognized that the overwhelming majority of courts, both before and after *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991), have held that the threshold judicial responsibility to determine arbitrability may, when merits and arbitrability are intertwined, trump the rule prohibiting consideration of the merits. *Rite Aid of Pa., Inc. v. United Food and Commercial Workers Union, Local 1776,* 595 F.3d 128, 137 (3d Cir. 2010) ("*Rite Aid* Decision") (collecting cases from the First, Third, Sixth, Seventh and Eighth Circuit Courts of Appeal, spanning more than thirty years). Rather than representing a "break" from circuit court authority, the *Rite Aid* Decision represents a *continuation* of long-time, well-entrenched case law.

Second, the *Rite Aid* Decision is not only consistent with a uniform body of circuit court case authority, the Third Circuit holding adheres to *Litton*. Courts have, almost without exception, read *Litton* as instructing "that the judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance." *IBEW*, 431 F.3d at 628. As the Seventh Circuit

explained *Litton*: "If the court must, to decide the arbitrability issue, rule on the merits, **so be it**." *Hyster*, 2 F.3d at 236 (bold type added).

Litton, however, explains itself best without the slightest suggestion that its broad judicial duty-to-determine-arbitrability holding was, in any way, narrowly limited to an expired collective bargaining agreement:

> Although doubts should be resolved in favor of coverage, we must determine whether the parties agreed to arbitrate this dispute, and **we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement**.

Litton, 501 U.S. at 209 (bold type added, internal citation and quotation omitted).

Litton did not hesitate to resolve the underlying merits dispute over the proper interpretation of a contractual provision because resolving that dispute was necessary to determine whether the grievance was arbitrable. Over the years, many courts have interpreted *Litton* to mean that the judicial responsibility to determine arbitrability takes precedence over the rule that courts may not decide the merits of an underlying dispute. *See Luden's Inc. v. Local Union No. 6*, 28 F.3d 347, 353-54 n.10 (3d Cir. 1994) (collecting cases). The *Rite Aid* Decision follows in a long line of circuit court decisions, which have read *Litton* as allowing consideration of merits when necessary to determine arbitrability.

Last, this case involves a minor contract dispute over arbitrability, the resolution of which is of no importance to anyone other than the immediate parties. The Union's Petition recognized as much when it labeled its dispute with Rite Aid as a "garden variety labor relations dispute" – one involving an "ordinary labor dispute over the meaning of contract language. . . ." (Union Petition, at 15, 17).

The Union argues, moreover, that the Third Circuit misapplied *Litton*. (Union Petition, at 13) ("Litton is plainly inapposite because it arises in a completely different context from the present case."). The mere misapplication of a rule of law rarely if ever constitutes grounds for the granting of a petition for a writ of certiorari. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the **misapplication of a properly stated rule of law**.") (bold type added).

This Court should deny the Union's Petition because (1) no split of circuit court authority exists (or is even alleged); (2) the *Rite Aid* Decision falls well within a long line of mainstream decisions that have properly and uniformly applied *Litton*; and, (3) the Union's contention that the Third Circuit misapplied *Litton* constitutes insufficient grounds upon which to grant a Petition. In sum, the Union has not supplied

a single *compelling* reason to grant its unexceptional Petition.

This Court therefore should deny the Petition.

II. The Third Circuit Court of Appeals Did Not Violate This Court's Arbitrability Case Law By Holding, On The Facts Of This Case, That A Court May Need To Touch Incidentally On The Merits When The Arbitrability Determination And The Merits Are Inextricably Intertwined

The Union asserts that the Third Circuit "departed completely" from this Court's "required" arbitrability analysis under *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 651 (1986) ("*AT&T*"). (Union Petition, at 11). The Union complains that the Third Circuit lost "analytical focus" when the Court of Appeals refused to limit its arbitrability analysis to whether the grievance's subject matter fell within the arbitration clause's scope. *Id.*

To the Union, determining arbitrability is a simple, straightforward matter: if a party to an agreement merely alleges violation of that agreement, then the grievance is *per se* arbitrable. (Union Petition, at 11) (citing *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960)). The Union's ban on any consideration of the merits when determining arbitrability is absolute – one admitting no exceptions. In sum, "we grieved,

ergo we arbitrate." Neither life nor law, however, is that simple.

The Union self-servingly assumes that courts can *invariably* determine arbitrability without ever touching on the merits. The Union's merits-ban position, however, ignores (or slights) both the "hard" cases in which the merits are inextricably bound-up with arbitrability and the paramount *judicial* responsibility to determine arbitrability.

Ironically, had the Third Circuit adopted the Union's absolute merits-ban rule, that court would have "departed completely" from two fundamental principles of arbitration jurisprudence. First, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that it has not agreed to submit. Second, whether a contractual duty to arbitrate exists is "undeniably" an issue for *judicial* determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, *not* the arbitrator. *AT&T*, 475 U.S. at 648-49. *The Union's Petition conveniently fails to mention these two fundamental arbitration precepts.* (Union Petition, at 10-11).

The practical effect of the Union's absolute merits-ban position is that arbitrators – not courts – will determine arbitrability, despite contract language to the contrary. The Union, in effect, seeks nothing less than the judicial "repeal" of the two *AT&T* arbitration precepts that it omitted from its

Petition: (1) the rule against forcing parties to arbitrate absent an agreement to arbitrate; and, (2) the rule making courts, *not* arbitrators, determiners of arbitrability. *AT&T*, 475 U.S. at 648-51 (*all* four arbitration precepts discussed).

The Union picks and chooses which arbitration precepts to emphasize, and which to ignore. The Union would make absolute the rule prohibiting courts from touching upon the merits when determining arbitrability. This rule, however, is not as absolute as the Union represents (or would like).

This Court recognized over twenty years ago that "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances. . . ." *AT&T*, 475 U.S. at 651. Just as courts may not assume federal jurisdiction based on "insubstantial" or "implausible" federal claims, courts may not refer *all* disputes to an arbitrator merely on one party's say-so – without first deciding whether the grievance claim is, in fact, arbitrable. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (federal question jurisdiction).

This case highlights the tension between two fundamental arbitrability precepts. On one hand, courts decide arbitrability. On the other hand, courts, when deciding arbitrability, may not rule on the potential merits of the underlying claim. *AT&T*, 475 U.S. at 649.

This tension, however, is "often more apparent than real." *Independent Lift Truck Builders Union v.*

Hyster Co., 2 F.3d 233, 236 (7th Cir. 1993)). Following *Litton*, the Seventh Circuit (like many other Circuits) resolved the tension in favor of the judicial determination of arbitrability even when the merits are decided in the process: "It appears, then, that the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If the court must, to decide the arbitrability issue, rule on the merits, so be it." *Hyster*, 2 F.3d at 236 (underlining added).

This Court should ignore the Union's "Chicken Little" warning that the *Rite Aid* Decision will result in the "unprecedented enlargement" of the federal court role in arbitration matters leading to disruption of the "stability of labor/management relations." (Union Petition, at 14). The *Rite Aid* Decision is far from "unprecedented." *Litton* and its progeny have been the law of the land for almost twenty years and the "sky has not fallen."[1]

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[1] The name "Chicken Little" and/or the phrase, "the sky is falling," are often used as references to a hysterical or mistaken belief that catastrophe is imminent. *See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.Com*, LLC, 521 F.3d 1157, 1176 (9th Cir. 2008); *Barton v. Horowitz*, No. Civ. 97 N 1980, 2001 WL 35710605, *2 (D. Colo. March 31, 2001) (opinion not available on LEXIS) ("As for Barton's Chicken-Little-esque prognostication that the court's March 6, 2000, Order is a harbinger that the sky is falling, he may rest assured that the court's Order will not sound the death knell for arbitration as we know it.").

The *Rite Aid* Decision joins a long line of post-*Litton* case law holding that the "judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance." *IBEW*, 431 F.3d at 628. The overwhelming post-*Litton* "prevailing view" obligates courts to address the merits of a grievance dispute if necessary to determine arbitrability. *Crown Cork & Seal Co., Inc. v. International Association of Machinist and Aerospace Workers*, 501 F.3d 912, 917 (8th Cir. 2007) (judicial responsibility to determine arbitrability trumps general rule to avoid consideration of merits); *Stevens Construction Corp. v. Chicago Regional Counsel of Carpenters*, 464 F.3d 682, 686-87 (7th Cir. 2006) (same); *International Chemical Workers Union Counsel v. PPG Industries, Inc.*, 236 Fed. Appx. 789, 793 n.4 (3d Cir. 2007) ("[W]e choose to accept the duty dictated by *Litton*. We must determine the question of arbitrability, even if that requires us to consider the underlying claim."); *IBEW*, 431 F.3d at 628 ("These decisions resolved the question of arbitrability differently, but the courts agreed that judicial review was required at least to the point of determining whether it was 'possible' for an arbitrator, consistent with the plain meaning of the agreement, to rule in favor of the party demanding arbitration."); *Hyster*, 2 F.3d at 236 ("It appears, then, that the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If the court must, to decide the arbitrability issue, rule on the merits, so be it."); *Luden's Inc.*, 28 F.3d at

353-54 n.10 (collecting cases reading *Litton* as having impliedly overruled the general rule that a court, in determining arbitrability, may not look to the merits of the underlying claim).

The *Rite Aid* Decision simply recognized that courts, if they are properly to discharge their judicial responsibility to determine arbitrability, must sometimes address the merits, especially when arbitrability and merits are inextricably intertwined. The *Rite Aid* Decision is not radical, new, or unprecedented. And the sky has not fallen.

The Union's arguments, moreover, are disingenuous. The Union *disregards* the fundamental rule that courts, not arbitrators, determine arbitrability. The Union *disregards* cases where merits and arbitrability issues are inextricably intertwined and arbitrability cannot be determined without reaching the merits. The Union *assumes* the rule prohibiting consideration of the merits is *absolute* – admitting of no exception, anytime or anywhere. That is not the law, nor should it be. *Rite Aid of Pa., Inc.*, 595 F.3d at 136 ("The Union additionally argues that the District Court impermissibly considered the merits of its grievance in making its arbitrability determination. We cannot agree. Decisions of the Supreme Court and Courts of Appeals have made clear that where the merits and arbitrability questions are inextricably intertwined, a court's arbitrability decision may, of necessity, touch incidentally on the merits.").

The practical effect of the Union's uncompromising and inflexible "merits-ban" position is the *de facto* substitution of arbitrators for courts in making arbitrability determinations. The end result is the subversion of the general rule that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that it has not *agreed* to submit.

The actual question presented is not, as the Union represents, whether *Litton* conforms to the *Steelworkers Trilogy*. (Union Petition, at i). Rather, the **true** question presented is whether this Court should **overrule** *AT&T* and the *Steelworkers Trilogy* to the extent those decisions hold that arbitration is a matter of contract, and determinations of arbitrability a judicial responsibility. The Union's position, if adopted wholesale, would turn the *Steelworkers Trilogy* and *AT&T* on their collective heads, make arbitrators judges, and compel parties to arbitrate matters they never agreed to arbitrate.

This Court should deny the Union's Petition.

CONCLUSION

For the reasons set forth above, Rite Aid of Pennsylvania, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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